Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-1274

In the Supreme Court
of the United States

OCTOBER TERM, 1974

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors,

Respondent,

v.

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL-MYERS COMPANY, a Delaware corporation; CARTER-WALLACE, INC., a Delaware corporation; ELI LILLY AND COMPANY, an Indiana corporation; ENDO LABORATORIES, INC., a Delaware corporation; ORTHO PHARMACEUTICAL CORPORATION, a New Jersey corporation; SQUIBB CORPORATION, a Delaware corporation; E. R. SQUIBB & SONS, INC., a Delaware corporation; A. H. ROBINS COMPANY, INC., a Virginia corporation; WILLIAM H. RORER, INC., a Pennsylvania corporation; and WARNER-LAMBERT PHARMACEUTICAL COMPANY, a Delaware corporation,

Petitioners.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ABBOTT LABORATORIES, an Illinois corporation, et al,

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ARGUMENT

1. The Court of Appeals held and respondent contends that the Nonprofit Institutions Act, as applied to hospitals, exempts from the Robinson-Patman Act only purchases of drugs which are dispensed in sales to a "captive market" consisting of inpatients and emergency room patients, which retail druggists cannot supply. The odd result is to exempt only two kinds of drug purchases which, by their nature, cannot impair competition or violate the Robinson-Patman Act, and to deter hospitals from dispensing drugs in ways which the Court of Appeals admits are proper hospital drug

uses. Such a construction of the statute denies it substantive effect and is contrary to the public interest. It cannot possibly withstand review by this Court.

2. Respondent misconceives the issue tendered by the petition. The decision of the Court of Appeals limits the statutory exemption *as a matter of law* to drugs dispensed to inpatients and to patients in the emergency room, and excludes from the exemption, also as a matter of law, three important drug uses which are the subject of the petition and which are essential to modern hospital services. Marginal hospital drug uses, including those referred to by respondent (Res. Br. 8), were not made subjects of the petition.*

3. The decision of the Court of Appeals does not depend upon the "intended" use of the drugs at the time of purchase (see Res. Br. 21); the essential fact is that they are used, like drugs dispensed in sales to inpatients and in the emergency room, to fill the needs of the hospital in providing its services to the community.

4. Respondent errs in suggesting (Res. Br. 10, 23-24) that the legal issue presented by the Court of Appeals' decision was not the subject of thorough discovery. The Court of Appeals accepted the record as

* Petitioners do not, of course, accept respondent's exaggerated characterization of the record; see, e.g., Res. Br. 23. The Court of Appeals conceded that "by far the greater part of hospital drug distribution" is within the exemption, even under its narrow construction of the Nonprofit Institutions Act (App. A6). The record shows that such use approaches 90 percent.

sufficient to decide that issue, and its sufficiency was conclusively established by respondent itself in its ill-tempered objection in this Court to the motion of American Hospital Association for leave to file a brief *amicus curiae*. In its objection, respondent complains that AHA's motion and brief:

> ". . . assume the record was incomplete when, in fact, the record was extensive, i.e., some 50 depositions and thousands of pages of exhibits, and more than adequate for the issues decided." (Objection, p. 2).

We agree: The issue before the Court is fully developed in the record, and there is no reason to delay the urgently-needed review of the decision of the Court of Appeals.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 9, 1975